

Evidence submitted on behalf of claimant
(rent book) lost by OCAO.

Copy
washed

JGM/BC
Cmmr held that the maxim
"omnia praesumuntur contra
spoliatorum" ^{could} apply - ie it could
be presumed that the lost document
would have told against the person losing it (ie the DSS).

Commissioner's File: CSB/1238/1985 (starred)
C A O File: AO 2987/85
Region: North Western

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW
FURTHER DIRECTIONS OF THE SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal:

Case No:

1. In this case I gave a decision dated 29 April 1986 setting aside the decision of social security appeal tribunal dated 30 July 1985 and referring the matter back to a different tribunal with directions.
2. Circumstances have now arisen that have led the parties to ask for further directions, both parties submitting that under section 12 of the Interpretation Act 1978 read together with regulation 27(a)(ii) of the Social Security (Adjudication) Regulations 1984 or now section 101(5)(b) of the Social Security Act 1975 as amended, I have power to give further directions. I hold that I have such power and give the further direction below.
3. The circumstances in which the need for further direction has arisen are as follows. The claimant made a claim for a supplementary allowance on a form A11(c) dated 3 April 1981. At that time rent could be a housing requirement for supplementary benefit purposes, and he answered the question who was responsible for the rent by giving his own name alone and stating that the rent was £9.93 per week provisional. He was initially allowed the entire rent as a requirement. It later emerged that the tenancy agreement dated 17 March 1981 named the claimant and his two non-dependent children as tenants, so that although he was no doubt jointly and severally liable for the entire rent his ultimate liability was at first sight at least for only one-third of that rent. The adjudication officer concluded that in the result that expenditure had been expenditure by the Secretary of State in consequence of the claimant's failure to disclose the facts about the tenancy agreement and required repayment of overpaid benefit. The appeal tribunal confirmed the decision on 30 July 1985.
4. In connection with his appeal it has been stated on behalf of the claimant that he always regarded himself as responsible for the rent as his children are mentally disabled. This was not put to the tribunal, but the point will be open to the new tribunal, as it may be argued that in the circumstances the claimant was as between himself and the children solely responsible for the rent. If such an argument prevailed, the matters next considered will not arise.

5. The claimant's main point is that he made disclosure of the fact that his children were named as tenants by sending in or bringing in the rent book at or about the time that he completed the form A11(c). The tribunal found that on 3 April 1981 (the date of the claim) he showed the rent book to the local office showing the rent of £9.93 in black ink. They also found that on 13 April 1981 the rent book "shows" final rent as £9.30 in blue ink, and that the names of the children as joint tenants were also there in blue ink. The word "shows" suggests that they were making a finding of what the book showed at 13 April but not at 3 April. I find it impossible to say on what evidence it was that they concluded that there had been a change between those two days, but it seems to have been based on an examination of the different coloured inks. The case papers contain a copy letter from the landlord corporation stating that the normal practice to give a tenant a copy of the tenancy agreement and a temporary rent book, and that the rent book should have the names of all the tenants in it. It is said that this letter was before the tribunal. Also in the case papers is a copy of the tenancy agreement itself dated 17 March 1981. This is a printed document with the names of all three tenants entered into it and shows rent of £9.93 per week from the start changing to £9.30 per week plus rates from 13 April 1981. Apart from any direct evidence that there may exist as to when the various entries in the rent book were made there is only the evidence that can be derived from the examination of handwritings and coloured inks. And I directed that the new tribunal in reconsidering the matter and not draw inferences from the colours of the inks without seeing the book.

6. It has now emerged (and this creates the need for further direction) that the original rent book was sent to the clerk to the social security appeal tribunal along with the claimant's application for leave to appeal to the Commissioner under cover of an undated letter (bearing a received stamp dated in September 1985): that it was passed to the Office of the Chief Adjudication Officer and cannot now be traced. I am asked in these circumstances to say what the new tribunal should do.

7. There is a legal maxim "Omnia praesumuntur contra spoliatorem" (all things are presumed against a "spoliator"). In relation to documents the rule has been expressed as follows - "If anyone by deliberate act destroys a document which according to what its contents may have been, would have told either strongly for him or against him, the strongest possible presumption arises that if it had been produced it would have told against him; and even if the document is destroyed by his own act, but under circumstances in which the intention to destroy evidence may fairly be considered rebutted, still he has to suffer." (See The Ophelia [1916] 2 AC 206 at pages 229-230). That case concerned a ship claimed to be liable to capture as prize whose papers had been cast overboard in anticipation of capture, and the person destroying the documents was obviously a spoliator. But the closing words quoted show that it could apply equally to documents destroyed in the ordinary course by reason of the impracticability of retaining them for ever. The present case is not one of destruction of documents at all but of loss of them. But I have formed the view that the same presumption arises in the case of the loss of evidence as the result of the breach of a duty to take care of them owed by one party to proceedings to another; (see Coldman v Hill [1919] 1 KB 443 at pages 457-458). I am not of course making any finding that there has here been any such breach of duty on the part of the Office of the Chief Adjudication Officer, but am merely indicating that the new tribunal may if they find there to have been such a breach rely on a presumption similar to that outlined in The Ophelia as applicable to the case of deliberate destruction.

8. In this connection I must refer to a submission made by the adjudication officer about the existence of any such duty of care. He referred me to a passage in paragraph 1510 of volume 2 of Hailsbury's Laws of England (4th edition) about "involuntary deposit", that is to say cases where a person has become bailee of property of or documents without having consented to it. Footnote 1 to the paragraph states that a slight assumption of control may make such a person the "depository", meaning I think a voluntary depository. I express no opinion as to the position immediately after the rent book had been sent unasked for with the application to the appeal tribunal for the manifest purpose of its being used in connection with the appeal to the Commissioner. I think however that if it is found that the office had accepted the book as sent for the purpose and passed it on to the Chief Adjudication Officer's Office for use in connection therewith it would be open to the new tribunal to hold that the office had become a voluntary depository on whom lay a duty to take care of the document. If the tribunal do find that there was such a duty of care and that there was a breach of that duty in losing the document, they can, in my judgment, apply the same sort of presumption as to its contents as could be applied in the case of deliberate destruction.

(Signed) J G Monroe
Commissioner

Date: 12 June 1987

Full name of Appellant (Surname) (Other names) Thomas	Case List No. AM. 03-04
Local Office: City	Tribunal Reg. No. 552 02833
CONSTITUTION OF TRIBUNAL	
*Full / Chairman and one member Names of Tribunal Chairman and members Mr C J Workman Mrs S Walker Mrs E Morron	Appellant notified of hearing on ..14/...7/19.89 Appellant— *present *not present

NAMES OF OTHERS PRESENT (WRITE "NONE" WHERE APPROPRIATE)

Appellant's representative (state organisation if any) Mr C Orr WRO	Witness(es)
Others (state capacity) Mr Bradley (clerk)	Adjudication Officer Miss Gillespie

Consent to hearing by less than full tribunal

*Appellant's consent given on tear-off portion AT6. Yes / No
 I consent to this case being proceeded with in the absence of a member of the Tribunal other than the Chairman.
 I understand the Chairman will have a casting vote if required.

Appellant's signature

1. Chairman's note of evidence (i.e. concise details of all oral and written details put before the tribunal)

The AT2 was presented. Mr Orr produced a copy of the commissioners decision in CSB/1288/85, which though based on English law, upholds the legal ruling that if a party to proceedings has destroyed documents relevant to those proceedings, then the presumption arises that those documents would be construed against him. How far this ruling will stand in the light of the current departmental practice to destroy case papers after a given period has still to be tested.

The tribunal also record their dissatisfaction with paragraph 6 of the further submission by the Adjudication Officer lodged in this case. That answer does not, in their view, deal adequately with the points referred to them by the tribunal at the hearing on 24.2.89.

Mr Orr said the main thrust of his argument was already set out in the AT3 of 24.2.89. In 1965 when Mr [redacted]'s eldest daughter went to work and left him to look after the family he became a single parent. Had he been a female then, at that time, it was policy to allow a female single parent the long term rate. The benefit officer (as he then was) failed to consider adequately, Mr [redacted]'s circumstances and had failed to exercise his discretion, as was open to him under the policy then in operation, and award the long term rate. That failure was a mistake under Section 104(1)(a) of the Social Security Act 1975. Mr [redacted] had tried to make arrangements for his young children, including help from his elder daughter, but de facto he was a single parent in these years and should have been treated as such.

contd.....

No. of continuation sheets

Findings of Tribunal on questions of fact material to decision (i.e. the relevant facts accepted from the evidence available).

1. The decision of the SSAT of 17.6.87 being given with reference to the appellant's health at 4.11.82, was based on a mistake as to a material fact, namely that his argument related to his family situation as a de facto single parent, and so, in terms of Section 104(1)(a) of the Social Security Act 1975 can be reviewed by this tribunal.
2. There is no evidence available from the department for 1965 but the decision of the Benefit Officer at that time not to exercise his discretion and treat Mr [redacted] as a single parent which could have been done under the policy then being applied to female single parents was either an error in law under Section 104(1A) or if the Benefit Officer was unaware that Mr [redacted] was a widower bringing up four or five young children on his own was a mistake as to a material fact under Section 104(1)(a) and the said decision can be reviewed by this tribunal.

No. of continuation sheets contd.....

Full text of *unanimous / majority decision on the *Appeal / *Reference (including amounts and effective date(s) as appropriate)

To allow the appeal and find that the appellant's requirement to be available for employment should be waived from 1966. If the exact date cannot be agreed between the appellant and the Adjudication Officer the matter should be referred back to this tribunal.

No. of continuation sheets

Reasons for decision (i.e. an explanation of why, when applying the facts to the statutory provisions and case-law, a particular conclusion reached. And why, if it is not clear from Box 2, certain evidence has been accepted or rejected.)

We agreed that in 1966 when Mr [redacted]'s eldest daughter returned to work and left him, a widower, to look after 4/5 children of school age, he was de facto a single parent. He should have been treated as such as was permissible under the policy then being applied to female single parent's and awarded the long term rate. When he had to sign on again on 11.4.80 he was aged 54, had not worked for 15 years and had only been a semi-skilled labourer when he had worked. We agreed he had no prospects of future employment and we regarded it as unreasonable that he should from that date be required to be available for employment as a condition of receiving a Supplementary Allowance.

No. of continuation sheets

Reasons for dissent if Tribunal not unanimous

Date 28/7/89 Chairman's signature..... C. J. Workman.....

For clerk's use only

SAT decision notified to parties to the proceedings on/...../19.. 8 AUG 1989

Form AT22 noted

Typing checked

Initials Date... 8. AUG. 1989..... 19

*Delete as necessary

APPELLANT: Thomas [REDACTED]
CASE LIST NO: AM 03-04

LOCAL OFFICE: City
TRIBUNAL REG NO: 552 02833

BOX 1 CHAIRMAN'S NOTE OF EVIDENCE CONTD

The Presenting Officer said the appellant's case papers have been weeded and only those from 1979 were available. The policy in 1965 was a discretionary one to be so exercised by the (then) Benefit Officer. She had no information prior to 1976, only that the youngest daughter was at home. In 1966 there was only one child at home, the others were at school.

Mr [REDACTED] said that in 1966 there were four or five children in the house. Mr Orr said that when Mr [REDACTED] had to sign on again in 1980, as his youngest child was now 16, he was aged 54 and had been unemployed since 1965. He met the conditions of Regulation 6(u) and 6(f) of the Requirement Regulations. He referred again to R(SB)5/87 and the caution given by the commissioners about exclusive reliance on failure to satisfy subparagraph (1) of Regulation 6(f) because of its different effect in relation to men and women, to the detriment of a male claimant.

BOX 2 FINDINGS OF TRIBUNAL CONTD

3. The summary of facts in box 2 of the AT3 of 24.2.89 are accepted.

4. On 11.4.80 when Mr [REDACTED] was required to sign on again he was aged 54, and a semi-skilled labourer and unemployed for 15 years. He met the conditions of Regulation 6(u) and/or, having regard to the commissioners comments in R(SB)5/87 the conditions of Regulation 6(f) of the Conditions of Entitlement Regulations. He had no realistic prospects of employment and it was unreasonable to require him to be available for employment.

DATE: 28/7/89

CHAIRMAN'S SIGNATURE: C J Workman

DR/JOB

Commissioner's File: CSSB/382/88

SUPPLEMENTARY BENEFIT ACT 1976

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL
TRIBUNAL ON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: Grace RUSSELL (Mrs)

Social Security Appeal Tribunal: Glasgow North

Case No: 5.55.04093

might to question visiting officer name of post

Claimant given
no opportunity
to cross examine
visiting officer
as s/he was not
present at SSAT.
SSAT accepted VO
evidence & rejected
claimant's. Error
of law - see R(SB)
10/86.

1. My decision is that the decision of the social security appeal tribunal dated 20 April 1988 is erroneous in point of law and is therefore set aside.

2. I have before me the following three appeals by the above-mentioned claimant:-

- (1) An appeal on Commissioner's File CSSB/382/88 which is concerned with the refusal of a claim made on 14 September 1987 in respect of redecorating materials for the claimant's bedroom and two sets of bedding for her two daughters.
- (2) An appeal on Commissioner's File CSSB/383/88 which is concerned with the refusal of a claim made on 8 February 1988 for a bed base and mattress for one daughter and a mattress for the other daughter.
- (3) An appeal on Commissioner's File CSSB/384/88 which is concerned with the refusal of a claim made on 8 February 1988 in respect of bedding for the claimant's two daughters.

Although I must give a separate decision in regard to each appeal it will be convenient in this decision to deal with all the issues raised in the said three appeals.

3. At the time under consideration the claimant was a 25 year old single parent. She had two children - Samantha (2) and Diane (6). She was the tenant of a local authority flat, and she had been in receipt of a supplementary allowance for a number of years. With regard to the issues raised in the appeal mentioned in (1) of paragraph 2 above it should be explained that on 14 September 1987 she called at the local office of the Department of Health and Social Security to report that she had had a house fire on 11 September 1987. She stated that she had been taken to a local hospital but had been discharged next day. She stated that when she returned to her home she discovered that her

furniture/

furniture had been smoke damaged or thrown out, and she contended that she required various items of furniture etc. The local adjudication officer decided that the claimant met the conditions for an award of an urgent needs payment in respect of various articles. He decided, however, that no single payment could be awarded in respect of her claim for bedding for both daughters or for the cost of redecorating materials for her bedroom. A visiting officer had called at the claimant's home on 21 September 1987 and was apparently of the opinion that despite the fire the wall covering in the claimant's bedroom was in a reasonable condition. The said visiting officer also considered that there was no sign of any smoke damage in the children's bedroom. The claimant, however, had stated that the children's bedding had been damaged by smoke and had been washed, but as the bedding still had the smell of smoke it had subsequently been thrown out.

4. Having regard to the said visiting officer's report the local adjudication officer decided, as stated above, that the claimant was not entitled to a single payment for redecorating materials for her own bedroom or two sets of bedding for her daughters' beds. He reached that decision having regard to the provisions of regulation 3(2) of the Supplementary Benefit (Single Payments) Regulations 1981 which provided as follows:-

A single payment shall be made only where -

- (a) there is a need for the item in question; and
- (b) in a case in which the payment would be in respect of the purchase of a particular item, the assessment unit -
 - (i) subject to Regulation 10(2)(b)(ii) does not already possess that item, and
 - (ii) does not have available to it a suitable alternative item, and
 - (iii) has not unreasonably disposed of or failed to avail itself of such an item;
 - (iv) has not failed to exercise reasonable care to preserve or protect such an item."

The local adjudication officer also decided that the said claim for bedding could not be allowed under regulation 24 of the Supplementary Benefit (Urgent Cases) Regulations 1981.

5. The claimant appealed against the local adjudication officer's decision to a social security appeal tribunal. The tribunal in question dealt with all the issues raised in the three appeals mentioned in paragraph 2 above on 20 April 1988 and gave just one decision in respect of all the matters concerned in these three appeals which are before me. The tribunal's decision was "To refuse single payments for redecoration, beds, mattresses and bedding." The findings of the tribunal on questions of fact which are contained in Box 2 of the record of the proceedings before the tribunal were as follows:-

"1. Although/

3.

"1. Although there was conflicting evidence the tribunal accepted the details of the A.O.'s visit which stated the beds, bedding and decoration were not badly affected by smoke damage and the house therefore did not need redecoration.

2. The disposal of the bedding was unreasonable.

3. The claimant still had beds for her children.

4. The absence of payment in the tribunal's view presented a risk but not a serious risk to the health of the claimant and her children."

The reasons for the tribunal's decision were as follows:-

"1. On the basis of 2.1 and 2.3 above there was no need for beds or bedding and Regulation 3 could not be considered satisfied. Regulation 30 was therefore excluded from consideration.

2. No one in the family was chronically sick and as the house did not (in the tribunal's view for the reasons given at 2.1 above) require redecoration no award could be made as there was no need."

6. The claimant's representative applied for leave to appeal to a Commissioner on a question of law from the tribunal's decision in respect of the issues which are the subject of the present appeals. That application was granted by the tribunal chairman, and I am now concerned with the appeal.

7. The claimant attended the hearing before the tribunal; but it is not clear whether she herself gave evidence to the tribunal. She had, however, made statements to the effect that her bedroom required redecoration and that she had had to dispose of the bedding of the children since it had been smoke-damaged. The tribunal decided to accept the information which had been given by the above-mentioned visiting officer and had presumably decided not to accept the statements which had been made by the claimant. The said visiting officer, however, did not give evidence to the tribunal, and the claimant's representative had therefore no opportunity to question him. In those circumstances, and having regard to the principles which were laid down in Commissioner's decision R(SB)10/96, I agree with the adjudication officer now concerned with the case that the tribunal's decision in regard to the issues raised in this appeal mentioned in (1) in paragraph 2 above falls to be regarded as erroneous in point of law and therefore set aside.

8. I shall now deal with the appeal mentioned in (2) in paragraph 2 above which is on Commissioner's file CSSB/383/88. It will be noted that this appeal is concerned with a claim which was made not immediately after the fire in the claimant's house in September 1987 but about five months later when the claimant contended that the existing bed bases were broken and that since her children were both bed wetters the mattresses were smelling. The information before me is to the effect that the local adjudication officer awarded a single payment in

respect/

respect of a bed base for one daughter but refused the payment in respect of the other bed base and both mattresses. He had regard to the fact that a single payment had been awarded in respect of a complete bed for one daughter in December 1985 and a single payment in respect of a mattress for the other daughter in February 1986. He therefore considered that having regard to the provisions of regulation 3(2) of the said Single Payments Regulations the claimant was not entitled to receive a single payment for a bed base and mattress for one daughter and a mattress for the other daughter. As already explained the tribunal in question gave the same decision in respect of each of the said three appeals including the same findings on questions of fact and reasons for the decisions. I agree with the adjudication officer now concerned with the case that the tribunal have not made adequate findings in regard to the condition of the bed base and mattresses as at the date of the claim for these items (8 February 1988). The tribunal made reference to the visit of an officer after the said fire but they have not made adequate findings regarding the situation at the time of the later claim. It would also appear that the tribunal did not consider the possible application of regulation 24 of the said Urgent Cases Regulations. I agree with the adjudication officer now concerned with the case that this appeal also ought to be allowed and the tribunal's decision set aside.

9. With regard to the third appeal which is on Commissioner's File CSSB/384/88 it is concerned with the claim for a single payment made on 8 February 1988 in respect of bedding for both children. The local adjudication officer refused this claim, and it would appear that he did so on the basis of the information received from the visiting officer after the said fire to the effect that the bedding had not been damaged by the fire. As already explained in regard to another appeal the claimant maintained that she had had to throw out the existing bedding since it had been damaged by smoke. The tribunal, however, have not made clear whether the claim for bedding made in February 1988 was a follow-up of the claim made in September 1987 or whether they regarded it as a fresh claim. If it was a fresh claim then the situation as at the date of this new claim should have been considered and commented on by the tribunal. I agree with the submissions by the adjudication officer now concerned with the case that the tribunal's decision in regard to this appeal falls to be regarded as erroneous in point of law and therefore set aside.

10. I have reached the conclusion that the decision given by the said tribunal in respect of all the issues raised in the above-mentioned three appeals falls to be regarded as erroneous in point of law and therefore set aside. The three cases must now be reconsidered, and it would be appropriate in my view for them to be reconsidered by the same tribunal. The next tribunal should, however, take care to deal with each appeal separately since it may well appear that different facts and circumstances relate to each case

(signed) D Reith
Commissioner
Date: 20 April 1989